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Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 27

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA AND ASSOCIATED MUSICIANS OF GREATER NEW YORK LOCAL 802, *Petitioners,*

v.

EDDIE WITTSTEIN ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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v.

EDDIE WITTSTEIN ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners American Federation of Musicians of the United States and Canada (AFL-CIO) and its Local 802, Associated Musicians of Greater New York, pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit entered on December 18, 1963 in *Eddie Wittstein, et al.* v. *American Federation of Musicians, etc.* and *Julius Schwartz, et al.* v. *Associated Musicians of Greater New York, Local 802, etc.*

OPINIONS BELOW

The majority and minority opinions of the Court of Appeals for the Second Circuit are not yet reported. They are reprinted in Appendix A, pp. 1a-13a *infra*. The opinion of the District Court for the Southern District of New York is reported at 223 F. Supp. 27. It is reprinted in Appendix B, pp. 16a-32a *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on December 18, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does Section 101 (a)(3)(B) of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. § 411(a)(3)(B)) forbid an international union from raising membership dues by a convention vote of delegates based upon the number of members they represent?

2. If Section 101 (a)(3)(B) so forbids, does it to that extent violate the First Amendment?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Section 101 (a)(3)(B) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, *et seq.*, 29 U.S.C. 401 *et seq.* and the First Amendment to the United States Constitution. These are reprinted in pertinent part in Appendix C, pp. 33a-34a *infra*.

STATEMENT OF THE CASE

A. The Factual Background

Petitioner American Federation of Musicians (AFL-CIO) is an international union comprising 675 local unions and a total membership, in June 1963, of approximately 280,000 (R. 46a).[1] Petitioner Local 802 is the largest local affiliate of AFM and has approximately 28,000 members. Many locals have less than 1% of Local 802's membership. (Official Proceedings of the 1963 Convention, Ex. B. to Scola Affidavit, pp. 7-30) (hereafter cited as "Proceedings").

The representation of locals at conventions is governed by Article 5 of the Federation's Constitution.[2]

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[1] "R." refers to the Appendix to Appellant's Brief in the court below (white-covered book). Ten copies of this Appendix are being filed with this petition. Appellees (respondents here) also filed an appendix but extra copies are not available and no references have been made to it in this Petition. The full record in the Court of Appeals has, of course, been filed with the clerk.

[2] "All Locals of this Federation of one hundred and fifty members or less shall be entitled to one delegate. All Locals shall be entitled to one delegate for each one hundred members or a major fraction thereof, not exceeding three delegates for any on Local, but each Local shall be entitled to one vote for each one hundred or major fraction thereof, but no Local shall cast more than ten votes, and the number each Local is entitled to shall be computed from the last report made on January 1st before the convention by the Local, according to the books of the Treasurer. On questions affecting a change in the laws, each Local may, upon roll call, cast as many votes as it has members, as per book of the Treasurer, A.F. of M. All laws so passed shall be referred to a convention committee consisting of the Executive Board, A.F. of M., and chairmen of all committees, who may sanction or veto same, their action to be final. Roll call shall be demandable and had under this Article on demand of ten delegates or five Locals."

Each local is entitled to one delegate for each 100 members, or major fraction thereof, but not to exceed three delegates for any one local. Upon the request of "ten delegates or five locals" there must be a roll-call vote on questions affecting a change of the constitution or bylaws; in such a vote "each Local may cast as many votes as it has members".

Thus, for example, Local 802, with 28,438 members, or 10% of the Federation's total membership, had two delegates at the June 1963 Convention, and was entitled, on a roll-call vote, to cast 28,438 votes, or 10% of the total eligible vote. Local 46, with 276 members, or .1% of the total membership, had three delegates and, on a roll call vote, was entitled to cast 276 votes or .1% of the total eligible vote.

The June 1963 Convention of the Federation addressed itself primarily to the effort of replacing its historic method of raising its major revenues. That method, a "tax" based on the earnings of traveling members, had been the subject of extensive controversy and litigation.[3] The proposed substitute known as "Recommendation No. 11" (R. 56a-59a), provided, in pertinent part, that effective January 1, 1964:

> "1. The Federation shall not impose dues based upon earnings of members ('taxes'). Such amendment shall apply to the 10% Traveling Surcharge Tax, the 15% Radio and Television Tax and the Theatre Defense Fund Taxes.
>
> "2. (a) Annual Federation Per Capita Dues payable by Locals to the Federation shall be $6.00

[3] See *Cutler* v. *AFM*, 316 F. 2d 546 (CA 2), cert. denied, 375 U.S. 941, December 9, 1963.

(inclusive of the Per Capita contribution for the Official Journal and the Lester Petrillo Fund)."

* * *

"4. Each Local shall maintain Local regular periodic dues at no less than the rates existing on June 1, 1963, plus $6.00 per annum. Such rates may be reduced with the consent of the International Executive Board."

After two voice votes on Recommendation No. 11, the Chairman announced that he could not make a decision, stating that "the ayes and nayes appear to be of equal response" (R. 60a).

A delegate, speaking on behalf of five locals, then requested a roll-call vote (R. 60a), pursuant to Article 5 of the Constitution.

A roll-call vote was thereupon taken with the delegates of each local casting as many votes as the locals had members.[4] Where the delegates from a local were in disagreement, this weighted vote method gave each delegate a proportion of the votes to which the local was entitled.[5] The result of the vote was, yes: 158,068⅔, no: 113,742⅓. (R. 61a). Recommendation No. 11 was thereby adopted.

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[4] For example, Local No. 1 cast 1,115 votes "yes" (Proceedings, p. 58).

[5] For example, Local No. 29 was entitled to 368 votes; two delegates favored and one opposed the resolution. Thus, the votes were cast yes: 245 1/3, no: 122 2/3 (Proceedings, p. 58).

B. The Proceedings in the Courts Below

1. The District Court

On August 14, 1963 Julius Schwartz and others brought suit to enjoin petitioner Local 802 from enforcing the increase of membership dues pursuant to Recommendation No. 11. (R. 3a-24a.)[6] On August 23, 1963 Eddie Wittstein and others brought suit against petitioner Federation to declare Recommendation No. 11 null and void and to enjoin the Federation from putting it into effect. The complaints alleged, *inter alia*, that the method by which Recommendation No. 11 was adopted violated § 101(a)(3)(B) of the Labor-Management Reporting and Disclosure Act of 1959, (73 Stat. 519 *et seq.*, 29 U.S.C. § 401 *et seq.*, hereafter referred to as "the Act"). On motion of defendants the cases were consolidated.

Defendants moved for summary judgment, filing affidavits in support of the motion; plaintiffs filed affidavits in opposition.

On October 28, 1963 the District Court (Richard H. Levet, J.) filed an Opinion, Findings of Fact and Conclusions of Law (R. pp. 122a-139a), reprinted as Appendix "B", infra. The Court found that there was no genuine issue as to certain facts relating to the enactment of Recommendation No. 11 by roll-call vote (B, pp. 24a-25a, *infra*.) The Court then considered whether this method of raising membership dues was lawful and concluded that it was not: "It is my conclusion that the convention failed to comply with the mandatory provisions of Title 29 U.S.C. § 411(a)(3)(B)(i) [§ 101(a)(3)(B)(i) of the Act] and that as a result I am forced to declare the action increasing dues to be void." (p. 31a, *infra*).

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[6] The Schwartz complaint contained an additional cause of action which was ultimately dismissed and is not relevant to this petition.

The Court thereupon granted judgment to plaintiffs in both actions "declaring that that portion of Recommendation No. 11 increasing the per capita dues of Federation members was invalidly enacted under 29 U.S.C. § 411(a)(3)(B)(i)", and enjoining the defendants from carrying that provision of Recommendation No. 11 into effect.[7] Judgment was entered in *Wittstein* on October 30, 1963 and in *Schwartz* on November 1, 1963.[8] On the same dates, the respective defendants filed notices of appeal.

2. The Court of Appeals

In view of the urgency of the case, the appeal was expedited in the Court of Appeals, argument being held on November 20, 1963, before Judges Medina, Waterman and Marshall. On December 18, the Court by a 2-1 vote affirmed the judgment of the District Court.

The Court held that the procedure followed was proper and, indeed, required under the union's by-laws. It further agreed with the unions that

> "the weighted voting is to all appearances the most 'democratic' method, in the sense that each member is duly 'represented,' and it is a method of voting widely recognized as fair and proper by a number of unions. Not only are similar provision

[7] Subsequently, the District Court entered an order of clarification which explained that it was enjoining only the collection of dues from the members pursuant to Recommendation No. 11 but was not invalidating the provision that each local must pay $6.00 annually to the Federation for each member of the local because the Act does not deal with payments from local union to internationals.

[8] In the *Schwartz* action the Court certified under Fed. R. Civ. P., 54(b) that final judgment could be entered on this cause of action although no judgment had been entered in the other, unrelated, cause of action.

> to be found, with some variations of detail, in many representative union constitutions or by-laws, but it may fairly be said that the passage of the Labor-Management, Reporting and Disclosure Act of 1959 was not brought about by any abuses found to have flourished under the aegis of the weighted voting system." (Pp. 5a-6a, *infra*).

The Court then stated what it took to be "the simple central issue":

> "in the context of Section 101(a)(3)(B), 29 U.S.C., Section 411(a)(3)(B), do the words 'by majority vote of the delegates voting at a regular convention' mean one vote for each delegate?" (p. 6a, *infra*)

This question was then answered in the affirmative:

> "As we are unable to perceive any other meaning attributable to the phrase, we hold: that each delegate at the 1963 Convention was entitled to one vote, no more, no less; that the resolution as passed was void, as violative of the plain requirements of the Act; and that the judgments appealed from must be affirmed." (id.)

The Court rejected the unions' arguments based on the language of the statute, its policy, analogies to voting in public and corporate elections, other provisions of the statute, and the legislative history. The Court said that the union's other contentions (which prominently included the argument that plaintiffs' construction would render the section unconstitutional) "have not been overlooked," but these were not discussed in the opinion.

On December 23, Judge Marshall filed his dissenting opinion, pp. 9a-13a, *infra*. He disagreed with the conclusion that the words "by majority vote of the

delegates voting" were intended and must be construed to invalidate this common and concededly fair method of delegate voting at union conventions. His own conclusion, based on a thorough discussion of the legislative history, was stated as follows:

> "It seems to me clear that Congress intended merely to assure that dues increases could not be imposed by irresponsible or arbitrary union leaders not answerable in any way to the membership at large. It did not set out to dictate to unions a particular method for voting by delegates at national conventions, and, especially, did not have any desire to foreclose national unions from giving more weight to their larger locals on this question. Under the majority's interpretation of this provision, the only way a national union could do this, and still give even small locals at least one delegate, would often be to increase the number of delegates and the expense of holding conventions, out of all manageable proportions.
>
> "In summary, then, I am most reluctant to employ the 'plain meaning' rule here as a means of preventing the use of a perfectly normal and accepted means of voting at union conventions, especially since there is no evidence that Congress felt this method was subject to any abuse whatsoever. It is noteworthy that none of the Congressmen and Senators who discussed the bill ever adverted to this problem, or indicated in any way that a change in the practice was desirable. The same is true of the many commentators who have exhaustively analyzed the provisions of the Act, from every possible standpoint. The term 'majority vote of the delegates voting' is susceptible to a construction which would allow delegates' votes to be weighed in accordance with the strength of the different locals they represent. We ought to accept that construction, and reverse the summary judgment herein." (P. 13a, *infra*)

REASONS FOR GRANTING THE WRIT

A. The Court of Appeals' Construction Invalidates Traditional and Democratic Practices of Many International Labor Unions

As the Court of Appeals recognized, weighted voting (which it invalidated) "is a method of voting widely recognized as fair and proper by a number of unions * * * [s]imilar provisions are to be found with variations of detail, in many constitutions and by-laws. * * *" (p.6a, *infra*). President George Meany of the AFL-CIO submitted an affidavit, based upon his own knowledge "that a large number of international labor organizations provide in their constitutions or by-laws that voting at conventions of the international union shall be by delegates weighed according to the number of members of the locals." (R. 110a).[9] Dr. Leiserson in *American Trade Union Democracy* (Columbia University Press, 1959) stated:

> "* * * every convention delegate casts not only his own vote, but a share of the voting strength

[9] An informal survey of international constitutions of AFL-CIO affiliates shows that at least 20 international unions provide for weighted voting by delegates as a method for raising dues. These include among others the International Brotherhood of Electrical Workers (AFL-CIO) with over 750,000 members and the United Steelworkers of America (AFL-CIO) with over 850,000 members. The United Auto Workers (AFL-CIO), with over a million members, has a closely related voting system which would likewise be invalidated by the decision below.

Bulletin No. 1239 of the United States Department of Labor summarizes the provisions of the union constitutions dealing with election of officers as follows (p. 15): "Under constitutions which provided for the election of officers by referendum, each eligible union member was to cast his own ballot. Where officers are elected at a convention, a delegate's voting strength is usually scaled to reflect the number of members he represents, although the specific formulas set forth in the constitutions differ considerably * * *"

> of the local union he represents as well. This voting strength varies with the size of the locals, and the total vote of a local union may be divided among its delegates or one of them may cast all its votes." *id.* at p. 130.[10]

The effect of the decision below is to require many international unions, if they are ever to raise dues again, to replace more democratic with less democratic voting procedures. Should they desire to retain the wholesome principle of equal membership representation, they would have to so increase the delegate strength of the larger locals as to make the holding of a convention exorbitantly expensive, if not physically impossible.[11] The millions of union members who are

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[10] Dr. Leiserson also writes (*id.* at p. 122):

> "The national union 'in convention assembled' is in many respects a unique political institution deserving more attention and study than political scientists have given it. Though a representative body, the typical convention is identified with the union itself as if it were a general meeting of all the members. On roll call votes the full membership of each local union is voted by its representatives in some conventions. In most, the same plebiscite effect is achieved by the delegates from each local casting a fixed number of votes proportionate to its membership. Often the elected delegates are instructed by their locals how they shall vote on certain issues.
>
> "• • • Combining within itself the functions of a constitutional assembly, a legislature, and a supreme court, it is also a nominating convention with many of the spectacular features of the quadrennial political conventions that nominate candidates for President and Vice-President of the United States."

[11] As Judge Marshall pointed out in his dissent below: "In the instant case the size of Federation locals varied from 20 (Local 629, Waupaca, Wisc.) to 28,000 (Local 802, New York City), so that a fully proportional system of representation would require some 14,000 delegates in an organization with 280,000 members." (p. 13a, *infra*)

in the larger locals would otherwise be virtually disenfranchised at international conventions.

The Court of Appeals' rigid determination that the only lawful system is one delegate, one vote, would not only invalidate provisions which allow delegates to vote the full *membership* strength of their constituency. It would likewise forbid the practice of a great many internationals to allow the delegates attending to cast the full *delegate* strength where less than the full number to which the local is entitled can come to the convention. Locals would thus be forced to spend more money sending delegates or lose their proportionate weight in the councils of their union. All this in the name of a statute whose avowed purpose is to protect union democracy and the members' interest in union funds!

The foregoing are the direct practical consequences of the decision below. In view of the number of international unions affected and the fact that these unions periodically hold union conventions at which the question of raising dues can arise, an early resolution of this question by this Court is clearly appropriate. Unless this Court acts now, these unions will be required either to 1) abandon salutary democratic procedures by force of a split decision by a single intermediate appellate court, or 2) risk invalidation of any future dues increase and consequent financial embarrassment.

There is also involved in this case a matter of fundamental principle affecting countless citizens who, in a free society, voluntarily form and join organizations. Does the Congress have the power to set aside

a rule of self-government that, in the words of the Court below, is "the most democratic method . . .", which harms no one and has not been found to be the subject of any abuses? That transcendent constitutional issue can be resolved only by this Court.

B. The Court of Appeals' Construction Raises Substantial Questions.

1. The Court of Appeals Has Plainly Misinterpreted Section 101(a)(3)(B)(i)

The refusal of the court below to include the weighted vote of convention delegates as a method permitted by the phrase "a majority vote of the delegates voting" in § 101 (a)(3)(B)(i) involves such a plain misconstruction of Congressional language as to warrant plenary review and reversal by this Court.

Even if it were to be conceded, as it was by the dissenting Judge, that the words of the statute most naturally bear the meaning which the majority found, the task of ascertaining the Congressional intent could not stop there.[12] For the Court's interpretation is contrary to the universally-acknowledged policies of

[12] We think that the language is entirely neutral on the point at issue. The word "vote", which the Court's construction renders superfluous, clearly refers to a delegate vote of the kind provided for under the labor organization's constitution. Moreover, when Congress did intend to specify that each member was to cast one vote only, it used appropriate, specific language to that effect. Section 401(e) provides that in elections by secret ballot of the membership (required for the election of certain union officers), "each member shall be entitled to one vote". Finally, the author of the language, Senator McClellan, could not, as we show below, have intended it to mean what the Court said it means.

the Act, is inconsistent with its other provisions, is irreconcilable with the legislative history, and raises serious constitutional questions which could otherwise be avoided.

Significantly, neither of the lower courts expressed the view that Congress as a matter of deliberate choice outlawed weighted voting as a method of raising dues. Indeed, such a choice would clearly have been in conflict with the purpose of the Act. As Judge Medina said: "Everyone seems to agree that the Labor-Management, Reporting and Disclosure Act was 'to insure union democracy,' and that the intended beneficiary of the provisions of the Act is the union member." Nevertheless, the Court adopted an interpretation which destroys a method which by its own view "is to all appearances the most 'democratic' method in the sense that each member is duly represented".[13]

This Court has held that the principle "one citizen, one vote" is constitutionally required in elections for government officials, *Gray* v. *Sanders*, 372 U.S. 368. It seems inconceivable that Congress would outlaw an

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[13] The Court's only attempt to justify its decision in terms of this Congressional policy was its unexplained surmise that "Congress intended to prevent future skulduggery of every possible character and description in the fertile field of increasing dues, initiation fees and assessments, even if no particular abuses in the matter of weighted voting for such increases had been proved." But the dissenting Judge said: "I can find no support for the majority's suggestion that dues increases are a particularly 'fertile field' for 'skulduggery,' to which an especially strict standard should be applied." And the majority itself conceded that "it may fairly be said that the passage of the Labor-Management, Reporting and Disclosure Act of 1959 was not brought about by any abuses found to have flourished under the aegis of the weighted voting system." P. 6a, *infra*.

attempt by a union to reflect that constitutional principle in its convention voting procedures.

The decision below denies equality of representation to the *members* by ascribing to Congress an inconsistent insistence on equality of *delegates*. Section 101 (a)(1) affirmatively requires that "every member of a labor organization shall have equal rights and privileges within such organization" with respect to many internal political procedures including "to nominate candidates [and] to vote in elections or referendums of the labor organization." A lower value cannot be ascribed to a member's right to be represented equally in an international convention, which is the highest legislative council of the union. By reading Section 101 (a)(3)(B)(i) without considering Section 101 (a)(1), the Court attributes to Congress an inexplicable and bizarre inconsistency of purpose.[14]

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[14] The Court's approach thus differed strikingly from that of the Secretary of Labor who, in executing his responsibility to administer Title IV of the Act, governing union elections, has acted on the assumption that individual provisions can be better understood by considering the statute as a whole. Relying in part on Section 101(a)(1), the Secretary has expressed the view that Congress did not in Title IV specify the system of representation which unions must adopt, but left it to their own constitutions. Department of Labor "*Technical Assistance Aid No. 5*" entitled "*Electing Union Officers*" (revised September 1962), pp. 42-43. The Secretary's views in interpreting a statute committed to his care so shortly after its enactment are entitled to great weight. (*Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139-40). But the Court below thought them of little significance. The Court speculated that Congress might have thought different considerations affect the election of union officers and the raising of dues. But the history of the Act shows that Congress thought that abuses with regard to election of officers were the most serious; see *Mamula* v. *United Steelworkers of America*, 304 F. 2d 108, 109-112 (CA 3).

The legislative history of the statute likewise compels the conclusion that the Court below erred. That history is discussed comprehensively in Judge Marshall's dissenting opinion at pp. 11a-13a *infra*. We think it necessary to add only a few observations.

The provision which became § 101 (a)(3) was not controversial; the three House bills, including the one which was supported by organized labor, contained identical language. President Meany testified at a hearing before a Joint Subcommittee of the House, "section 101 (a)(3) actually permits changes in dues * * * by every method which unions generally employ except action by a general executive board or similar body." *Hearings on Labor-Reform Legislation Before the Joint Subcommittee on Education and Labor of the House Committee on Education and Labor*, 86th Cong., 1st Sess. 1482, 1518 (1959). See R. 111a-112a. The accuracy of his understanding was disputed neither by any member of the Joint Subcommittee nor by Senator McClellan, who responded to Meany's other interpretations on an item-by-item basis.[15] The courts should not attribute to Congress a silent intent to outlaw a historic and concededly democratic practice of a substantial portion of the labor movement. As the Court of Appeals for the Seventh Circuit said in construing this same provision, "On the contrary, we must assume that Congress was aware of the estab-

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[15] 105 Cong. Rec. 10902, 2 *Legislative History of Labor-Management Reporting and Disclosure Act of 1959* (G.P.O., 1959), hereafter cited as *Leg. Hist.*) p. 1294.

That President Meany's testimony was given more than routine consideration is further evidenced by the adoption of his proposed amendment empowering international executive Boards to enact interim dues increases between conventions when so authorized by their International constitutions. See § 101(a)(3)(b)(iii).

lished structure and practices and interpret the statute in the light thereof," *Ranes* v. *Office Employees, Etc.*, 317 F. 2d 915, 917-18. The approach of the court below is diametrically opposed to and in conflict with that of the Seventh Circuit in the *Ranes* case.

The most important evidence in the legislative history on the present question is that separate bills were introduced by Senator McClellan and Congressman Barden, (then Chairman of the House Committee on Education and Labor) which would have *required* that delegates' voting strength be weighted according to the size of their constituency.[16] Section 104 (2) of S. 1137, the McClellan Bill, provided as follows:

> "Voting at Conventions.—All delegates elected or designated by the constituent units of an international labor organization pursuant to the provisions of Section 103(2) to represent such constituent unit at any meeting or convention held by such labor organization shall have a vote in all elections for officers and upon other matters brought before such meeting or convention for action or ratification by vote, *which vote shall be numerically equivalent, or proportionate, to the number of the members of such constituent unit* as disclosed by the roster of members required to

[16] This proposal apparently grew out of certain abuses uncovered by Select Committee on Improper Activities in the Labor-Management Field, of which Senator McClellan was chairman. These abuses included the creation of ghost locals which could cast votes at international conventions, or of dividing a single locals into several, thus giving the original local a disproportionate voice in the international. See S. Rep. No. 1417, 85th Cong., 2d Sess., pp. 198-99, 191. Of course, such practices could flourish only where the voting strength of each delegate was unrelated to the membership of the local.

be furnished under the provisions of section 103 (3)." (I *Leg. Hist.* 278, emphasis supplied).[17]

It is thus apparent that the supporters of the foregoing bills regarded weighted voting in proportion to local membership not as an evil, but as a desirable procedure to assure internal union democracy. Indeed, in referring to this provision of his Bill, Senator McClellan stated that it was designed to insure "Fair and equitable representation of constituent units" (*Analysis*, Par. 4(b), 105 Cong. Rec. 2668, 2 *Leg. Hist.* 1001). Similarly, Representative Barden referred to the voting provision in his bill as a "guarantee" of "democratic processes" (*Summary, Par.* III, 105 Cong. Rec. 2862, 2 *Leg. Hist.* 1468).

It was Senator McClellan who first introduced, as part of his "Bill of Rights" amendment (105 Cong. Rec. 6475-76, 2 *Leg. Hist.* 1102), the provision which ultimately was enacted as § 101(a)(3). Section 101 (a)(4) of his proposal was entitled "Freedom From Arbitrary Financial Exactions". Most relevant was his language describing the required procedure at an international convention, § 101 (a)(4)(A)(ii): "majority vote of the delegates present". The only change from this language to § 101 (a)(3)(B)(i) as finally enacted is that "present" was changed to "voting"—presumably so that abstaining delegates need not be counted as opposed to a dues increase. Otherwise the language which became law is that of Senator McClellan. It simply defies reason to assume that Senator McClellan, who had proposed that the *only* lawful

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[17] A similar provision, in somewhat different language, was contained in § 102(b)(3) of the Barden bill, (H.R. 4473, 1 *Leg. Hist.* 190).

method of convention voting be weighted voting should sponsor an amendment which would make weighted voting unlawful.

Perhaps the most serious single mistake in the reasoning of the majority below was its failure to draw this obvious inference from Senator McClellan's proposal in S. 1137 and his sponsorship of what ultimately became Section 101 (a)(3)(B)(i). The majority said: "It is surprising that appellants should also rely upon the McClellan Bill and the Barden Bill, each of which specifically *allowed* weighted voting. * * * These bills were rejected." (Emphasis added). The Court plainly misunderstood S. 1137, which would not only have *allowed* weighted voting but would have *required* it to the exclusion of all other bases of representation. "These bills were rejected", not because Congress was affirmatively opposed to weighted voting, but because it was unwilling so to restrict unions in formulating voting procedures. The changes made from the Bill of Rights as introduced by Senator McClellan, first in the Kuchel bill and then in the House bills, enlarged the permissible methods of raising dues. By these actions Congress demonstrated that it did not wish to disturb those union procedures which, in Rep. Griffin's words, assured members, "that their dues and initiation fees will not be increased arbitrarily." 105 Cong Rec. 15530, 2 *Leg. Hist.* 1566.

Congressman Griffin added "What rank and file union member will complain because the law guarantees him the right to a democratic voice in the affairs of his union?" (Id.) If this "guarantee" was properly interpreted by the Court below, the answer would have to be "All members of large locals whose vote in their unions councils is diluted by force of law." But we think it clear that the majority's interpretation is

wrong, that Congress had no such intent, and that Section 101 (a)(3)(B)(i) permits the concededly democratic voting method followed by the Federation's convention. As the Seventh Circuit concluded in *Rances* v. *Office Employees*, 317 F.2d 915 at 918: "The protection of the rights of union members is the purpose of 101 (a)(3). Unless the provisions of subsection (B) are meaningless, Congress has said that that purpose is served when union members have representation at the council table where dues structures are changed."

2. The Court of Appeals' Construction Conflicts With the First Amendment

The decision below not only misinterprets § 101 (a)(3)(B)(i), but also creates a serious conflict with the First Amendment. Under that decision union members are forbidden to make decisions regarding their own fiscal affairs by a procedure which in the Court of Appeals' words "is to all appearances the most 'democratic' method, in the sense that each member is duly 'represented' ". Such unprecedented interference with the self-government of union members cannot be squared with the First Amendment, which, it is now settled, protects freedom of association. (*NAACP* v. *Button*, 371 U.S. 415; *Louisiana* v. *NAACP*, 366 U.S. 293; *Shelton* v. *Tucker*, 364 U.S. 479; *Bates* v. *Little Rock*, 361 U.S. 516; *NAACP* v. *Alabama*, 357 U.S. 449; *De Jonge* v. *Oregon*, 299 U.S. 353; *Thomas* v. *Collins*, 323 U.S. 516.)

As Mr. Chief Justice Hughes said for a unanimous court in *Amalgamated Utility Workers* v. *Consolidated Edison Company*, 309 U.S. 261, 265:

> "Neither this provision [Section 7 of the Wagner Act] nor any other provision of the Act can prop-

> erly be said to have 'created' the right of self-organization or of collective bargaining through representatives of the employees' own choosing. In *National Labor Relations Bd.* v. *Jones & L. Steel Corp.*, 301 U.S. 1, 33, 34, we observed that this right is a fundamental one; that employees 'have as clear a right to organize and select their representatives for lawful purposes' as the employer has 'to organize its business and select its own officers and agents'; that discrimination and coercion 'to prevent the free exercise of the right of employees to self-organization and representation' was a proper subject for condemnation by competent legislative authority. We noted that 'long ago' we had stated the reason for labor organizations—that through united action employees might have 'opportunity to deal on an equality with their employer,' referring to what we had said in *American Steel Foundries* v. *Tri-City Central Council*, 257 U.S. 184, 209."

The right to form labor organizations must necessarily encompass the right of the members to determine the form which such organizations will take, and particularly the basis on which the wishes of the membership are to become union law. Even as the religious guarantees of the First Amendment sharply limit governmental interference with the determinations and internal organization of religious bodies (see, *Watson* v. *Jones*, 13 Wall. 679; *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94), so the freedom of association limits government interference with the internal organization of labor unions.

The 1959 Act is undoubtedly the most pervasive regulation of the internal affairs of unions ever known in this country. Hitherto the Congress, state legislatures, and the courts have largely left the responsi-

bility for union government where it belonged—with the members. It was to be anticipated that the abandonment of this policy by Congress would raise serious questions of power, both in terms of our federalism, and, more importantly, in light of the affirmative protection of the First Amendment. Since it has been held that the freedom of association is not absolute,[18] delicate problems of balancing the declared public interest in regulation and the members' constitutionally based freedom from governmental interference will arise. But the decision below raises the constitutional questions in a much less difficult form: As construed by the majority, the statute outlaws long-recognized union procedures for self-government, admittedly without advancing union democracy—the provision's sole avowed purpose. On the one side of the constitutional balance thus to be struck is the right of members of an organization to allocate voting strength with regard to major policy decisions so as to give equal treatment to all members; on the other side is—nothing. The constitutionality of this application of § 101 (a)(3) cannot be sustained on the ground that the section may in other situations serve some legitimate congressional objective. "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton* v. *Tucker*, 364 U.S. 479, 488.[19]

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[18] See, e.g., *Communist Party* v. *Control Board*, 367 U.S. 1, 88-105.

[19] The absence of any identifiable public purpose also removes all basis for federal intervention into an area which hitherto had been committed exclusively to the states, which alone had previously regulated even in part, the affairs of private associations.

Unless freedom of association no longer encompasses the right of employees to self-organization, or union members, unlike other citizens, are to be regarded as mere wards, unable to govern themselves except under the benign tutelage of outside authority, the decision below cannot be reconciled with the First Amendment.

CONCLUSION

The Judgment Below Should Be Summarily Reversed

The substantiality of the question presented is abundantly demonstrated by Judge Marshall's dissent, and the additional considerations advanced in this Petition. Indeed, the error of the Court below on the issue of statutory interpretation is so clear, that we earnestly urge this Court to summarily reverse the judgment below. A comparison of the majority opinion and the dissent would alone justify this course. Whereas the dissenting judge carefully analyzed the legislative history to arrive at his interpretation, the majority, to the extent that it gave consideration to that history, drew inferences which, as we have sought to show, were patently unsound. The majority's failure to grasp the implications of Senator McClellan's proposal of a bill requiring weighted voting, prior to his sponsorship of what became, without relevant

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The asserted basis of the regulation of union affairs in the 1959 Act is a nexus between union democracy in labor unions and interstate commerce. Any regulation which does not promote this objective of the statute is outside any provision of Article I, Section 8, of the Constitution. As this Court stated in *Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234, 247-49, the "necessary and proper" clause of the Constitution is not a grant of power in addition to the other clauses of Article I, Section 8, but is merely a caveat that these are to be broadly interpreted.

change, the very provision in question here, is particularly significant. The conclusion of the dissenting judge is further reinforced by the by-now well-settled principle, apparently unheeded by the majority, "that a statute should be interpreted, if at all possible, in such a way as to free it from not insubstantial doubts." *Lynch* v. *Overholser*, 369 U.S. 705, 711. Can it seriously be denied that an Act of Congress which forbids an egalitarian distribution of political power within a trade union creates substantial constitutional doubts?

The petition for certiorari should be granted and the judgment reversed.

Respectfully submitted,

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